No. 5619

United States
Circuit Court of Appeals
For the Ninth Circuit

ELROY CARL HOULE, an infant, by WILBUR HOULE, his Guardian ad Litem,

Appellant,

vs.

HELENA GAS & ELECTRIC CO., a corporation,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Appellant's statement of the case is so concise that it omits much that is material to the consideration of the questions presented. Such additional facts will be referred to later in discussing the evidence.

Counsel submit an imposing list of cases, most of which support general principles of law, regarding which there is no dispute and which cases are not applicable to the pleadings and facts in this case.

Before reviewing the facts and discussing the law applicable thereto, certain statements in ap-

pellant's brief, with which we cannot agree, will first be considered.

On page 4 it is stated that the complaint "alleged the negligence of the deefndant in general terms." On the contrary, the complaint, in paragraph 15, specifically alleges the only negligent acts complained of, in the following language:

> "That at said time and place, the said defendant in violation of the duty it owed to the public generally and to this plaintiff in particular, negligently, carelessly and recklessly allowed and permitted its said wire, broken and disengaged as aforesaid, and while so heavily chraged with such high and dangerous electric current in voltage of approximately 2000 volts, to be and remain upon said public sidewalk on the easterly side of said Ewing Street, to the great danger of all passers-by." (R. p. 6.)

The allegations in the paragraphs preceding paragraph 15 merely describe the situation, instrumentalities involved and that a wire with a high voltage became broken, without any suggestion of negligence therein. The allegations in paragraphs 19 and 20 (R. p. 8) merely refer to the "negligence of the defendant in this complaint alleged" and to the "acts, omissions, and conduct herein complained of" and the only negligence alleged and the onl yacts or omissions complained of are those set out in said paragraph 15.

On page 2 of the brief they say the boy was seriously and permanently injured. While the evi-

dence shows he did sustain a severe shock, the record does not show any serious permanent injuries. (R. p. 26 and p. 65.)

Appellant, also, on page 4, states that "the case was tried upon the theory that the doctrine of res ipsa loquitur is applicable." This statement is too broad. The answer in paragraph 3 specifically denies the only negligence alleged as contained in paragraph 15 of the complaint and then denies the allegations of paragraphs 19 and 20 (R. p. 11) which merely refer to the acts of negligence complained of in paragraph 15 (R. pp. 6 and 8).

The record shows that defendant did not try the case on the theory that the complaint alleged negligence only in general terms, whereby the doctrine of res ipsa loquitur alone became applicable. When counsel for plaintiff attempted to introduce evidence as to defective conditions of the wire or as to matters other than the specific acts of negligence charged in paragraph 15, objection thereto was made (R. p. 33), and page 35 of the record shows the following:

> "Q. State whether or not within thirty days prior to the 11th day of January 1928 you observed the condition of the wire on this pole?
>
> MR. HALL: We object to that testimony as there is no allegation of any defective condition of the wire and the only allegation of negligence being one, that is this broken wire was allowed to remain there an unreasonable time after it was broke; for the further rea-

son that the plaintiff having elected to stand upon the specific ground of negligence in their complaint cannot rely upon the doctrine of res ipsa loquitur; upon the further ground, if he had any other ground, the defective condition of the wire, they are bound to allege that and prove it if they can, and rather relying on the premises of negligence under the res ipsa loquitur doctrine.

MR. LOBLE: It may possibly be rebuttal.

THE COURT: Yes, if it comes then, reserve it for then, not now. You rely simply upon negligence and discovery and removal of wire after it fell.

MR. LOBLE: That is correct, but we are showing the general condition of the wires since that time, not specifically. Very well.

THE COURT: Your next witness.

MR. LOBLE: Just one second.

MR. ADAIR: May it please the Court: In connection with the allegations of negligence in paragraph 15 of the complaint, we allege it was the duty of the company to keep and maintain its plant and wires in a good and safe condition.

THE COURT: You are alleging duty there; you are not alleging negligence; there is no allegation further than they failed to take up this wire in due time—" (R. pp. 35 and 36).

ARGUMENT.

As already stated, the only negligence charged, is that the defendant negligently, carelessly and recklessly allowed and permitted a broken wire, charged with high electric current, to be and remain upon a public sidewalk (R. p. 6).

The defendant denied such charge of negligence and pleaded, as a separate defense, an Act of God (R. p. 12).

The evidence in this case shows that an unusual, excessive, extraordinary and unprecedented wind storm prevailed during the evening and night of January 11, 1928.

The weather bureau records disclose a maximum velocity of 77 miles per hour (R. p. 57), which occurred between 10:38 P. M. and 11:38 P. M. (R. p. 91). The records of previous winds do not show as much damage reported (R. p. 60) although there were three winds between the years 1912 and 1921 of approximately the same velocity (R. p. 59).

This wind blew down electric light and telephone poles, and wires, signs, street lamps, smoke stacks, chimneys, buildings, sky lights, etc., all over the city (R. pp. 57, 67, 69, 71, 72, 74, 82, and 83). Mr. Bernier, the manager of the electrical department of the defendant company (R. p. 76), testified:

> "That night we were having a great deal of trouble, and from about six-thirty somewhere after that, until away early in the morning about three of the linemen were out, the entire force of linemen, so that the man at the sub-station, when he got word of difficulty or anything, he had to locate these men at the places where they were at work" (R. p. 82).

With such a night and all the linemen out working, the plaintiff left a theatre about three or four minutes after eleven P. M., went to Brady's store

and got some sherbet, then to another place and bought some popcorn, then several blocks to the intersection of Eighth Avenue and Ewing Street, where the wire was down on Ewing Street between Eighth and Ninth Avenues, and he thinks it was about twenty minutes after eleven when he arrived at that point (R. pp. 20-21-22).

Shortly after 11:00 P. M. parties in Mr. Loble's home on Ewing Street heard a scream (R. pp. 37, 39 and 40), and, upon going out, found the plaintiff on the sidewalk and, at about 11:20 P. M., Mr. Loble called Mr. Kellar at the trouble station of the deefndant company (Tr. p. 98) advising him that a person had been hurt by a live wire.

Cummings, a witness for plaintiff, testified that at approximately 10:30 P. M. he noticed intermittent flashes from a wire on Ewing Street between *Eleventh* and *Thirteenth* Avenues (R. p. 46) and telephoned the trouble station at about 10:30 P. M., but that this estimate of the time might be off five or ten minutes (R. p. 48); that the man at the station said he would tell the linemen (R. p. 47) and have them out there at once (R. p. 48).

There were five electric light wires on the cross arms on the poles along Ewing Street (R. p. 76).

Kellar, the man at the trouble station, testified that he got a report of trouble on Ewing Street at 10:50 P. M. and at once killed the *arc circuit* wire (R. p. 98). (So this wire was dead before

the plaintiff left the theatre.) Kellar further testified that at about 11:15 to 11:20 P. M., Mr. Loble called him and said someone had been hurt by a wire on Ewing Street but that he (Kellar) did not know whether he was hurt before 10:50 P. M. by the wire he had killed at that time, or by some other wire (R. p. 98).

Kellar referred Loble to Mr. Bernier (R. p. 98) and later got a communication from Bernier to shut off the east side *primary* wire (R. pp. 98 and 99). Mr. Bernier testified:

> "When Mr. Loble first called me, and I called up the sub-station, he then told me that the arc wire was down at 10:50, and I shut off that wire. The disturbance which shows here wasn't until about 10:50, and that is what I refer to, and it was later than that when Mr. Loble again called me up, a few minutes after eleven, that I first knew there was another wire, or arc wire; that was done by this other disturbance at 11:15 or 11:20." (R. p. 90.)

Bernier, when first called by Loble, called the trouble station and learned from Mr. Kellar that an *arc wire* had been down which was killed at 10:50 P. M., so he did nothing in regard to having other wires killed; but shortly after that he again heard from Loble that a wire was still sparking "when, for the first time, I realized there was some other wire besides the arc wire that was causing trouble; I then called up the plant and told them to kill the wire, and he did so. The reason I know that is because I am on the same circuit

and immediately my lights went out." (R. p. 81.)

The chart or record, (Defendant's Exhibit 2), made by the automatic machine showed circuit trouble about 10:50 P. M. and that after that was taken care of that there was another circuit disturbance about 11:10 to 11:15 P. M. (R. p. 89).

After ordering the second wire killed, Bernier got into his automobile and went to Ewing Street to cut down the wire that had been killed and there met Mr. McCann who came there for the same purpose (R. p. 81).

McCann testified:

> "I was called that night; Mr. Kellar called me from the sub-station at a quarter after eleven to go east on Ewing and told me a man tangled up with the wires and to stay there until the line was repaired; I responded at once, and when I got there Mr. Bernier was coming down the street as I crossed; I couldn't see who it was. I said: Get away from these wires. When I got up I saw it was Mr. Bernier; that is the first I knew of this wire being down when I was called by Mr. Kellar." (R. p. 111.)

It thus appears from the record, without any conflict, that a report of wire trouble on Ewing Street about *four blocks north of the point* of the accident was first made by Cummings somewhere about 10:30 to 10:40 P. M.; that the arc circuit wire with large voltage was theerupon killed at 10:50 P. M.; that the next report of wire trouble on Ewing Street, and also as shown by the chart,

was between 11:15 and 11:20 P. M. when Loble reported someone hurt by a live wire, but with nothing to indicate that he had not been hurt before 10:50 P. M. by the wire killed at that time.

So the first knowledge the defendant had that a live wire, other than the arc wire killed at 10:50, was down on Ewing Street was when Loble called Kellar between 11:15 and 11:20 P. M. There is no evidence to show that this second wire (the only one that could have come in contact with plaintiff as the arc wire was dead before he left the theatre), had been broken and on the sidewalk for even one minute before plaintiff came along.

On the other hand, it appears, without any conflict in the evidence, that the defendant, upon receipt of the first knowledge of wire trouble on Ewing Street at once killed the wire causing the trouble at 10:50, as the chart shows no trouble from 10:50 until between 11:15 and 11:20. It further appears that upon the report from Loble of another live wire on Ewing Street the circuit was at once cut off at 11:20 P. M.

Therefore, the plaintiff failed to prove by any substantial evidence that the broken wire which caused his injury had been broken and down for such an unreasonable length of time prior thereto as to constitute negligence of the defendant or to sustain the only allegations of negligence set out in the complaint.

BROKEN OR FALLEN WIRES.

20 Corpus Juris, p. 356, says:

> "Diligence must be exercised to repair any breaks in the wires. To permit broken, fallen, or crossed wires charged with electricity unnecessarily to remain in a highway is negligence for which a telephone company, electric company, or both are liable. This is true where the company has notice of the condition, regardless of the causes which produced it. But to show negligence in this respect a reasonable time to repair it must have elapsed, except where the break was itself the result of negligence. What is a reasonable time depends on the circumstances of each case."

Where a telephone breaks during a great and unusual sleet storm, and falls upon an electric light wire strung on the same pole, the telephone company cannot be charged with negligence because it did not learn of, and repair the break within an hour or an hour and a half after it occurred.

> Aument v. Penn. Telephone Co., 28 Pa. Super. 610.

Where a telephone wire is broken by a severe storm and falls on an electric light wire which has become grounded by a tree blown over by the storm, the liability, if any, of the owners of the wires depends on the negligence of the construction and maintenance, where the injury occurs immediately after the falling of the wire and before either company has had reasonable time to remove the danger.

Heidt v. Southern Telephone Co., 50 S. E. (Ga.) 361.

Where evidence fails to show that the wire had been broken for more than eight minutes before an accident, held there was no liability.

Jones v. Union Ry. Co., 98 N. Y. Supp. 757.

Where the evidence shows that the wire had been broken about ten minutes before the accident, held that there was no liability. The defendants showed the wire had been broken by a contractor for the city.

Scarpelli v. Wash. Water Power Co., 114 Pac. (Wash.) 870.

In this case, the court said:

> "When a plaintiff in actions of this character makes no attempt to show the negligent cause of the act complained of, but relies wholy on the legal presumption of negligence his facts establish, he must accept or controvert the defendant's explanation as to the cause of the act, and show its insufficiency or other nonapplicable features, if he would prevent the court from holding as a matter of law that the presumption is overcome."

As to lapse of time considered sufficient to afford notice of a defect or for the inspection of a defect, see 20 Corpus Juris, page 361.

Dierks Lbr. Co. v. Brown, 19 Fed. (2d) (8th Cir.) 732, is a good case in which liability is denied and the "res ipsa loquitur" doctrine discussed and held that such doctrine does not relieve the plaintiff of the burden of proving negligence, does

not shift the burden of proof and that the motion for directed verdict should have been sustained. The court said:

> "Assuming as we do that the doctrine of res ipsa loquitur applies in this case, hence that a prima facie case of negligence was established, defendant could exculpate itself by showing there was no defect in its appliances, or that if there was it was caused by circumstances beyond its control, or had existed for so short a period of time that it could not reasonably be expected to have been advised of it. 9 R. C. L. p. 1223, paragraph 30. Does the evidence furnish such exculpation or is there absence of explanation? The ultimate question here is, when all the evidence was in had plaintiff made such a case of negligence as to warrant a jury in returning a verdict for her? * * * *
>
> If a jury could be permitted to guess and speculate in the absence of evidence thereof that the broken wire caused the excessive current, the fact remains that the wire must have been broken within an hour of the time plaintiff claims to have been hurt, as the sewing machine was being operated without any excessive current up to that time. The defendant was entitled to a reasonable time to discover and repair the broken wire. What is 'a reasonable time' is dependent on the circumstances of each particular case. If the facts, or the reasonable inferences to be drawn therefrom, are in dispute it is a question for the jury. Chesapeake Ins. Co. v. Stark, 6 Cranch, 268, 3 L. Ed. 220; Hamilton et al. v. Phoenix Ins. Co. of Hartford (C. C. A.) 61 F. 379. It may, however, be a question of law, if the facts and the reasonable inferences to be drawn therefrom are not in dispute. El-

liott on Contracts, vol. 2, paragraph 1550; Pickel v. Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898; Keller v. Hasley et al., 130 App. Div. 598, 115 N. Y. S. 564. It would seem that such break in the wire, if it occurred, was so near the time of the alleged accident as to repel under all the circumstances here disclosed any inference of negligence on the part of defendant in failing to discover and repair the same."

Where it appeared that a pedestrian was found dead on the street at 3:00 A. M., wrapped in telephone wire, which had fallen across electric light wire; that only a short time had elapsed between the breaking of the telephone wire and the fatal injury; and there was no evidence that the insulation of the electric light wire was not of the best kind or that proper inspections were not made or that the light company had notice that the wire was broken or could have discovered it in time to have prevented the accident, it was held the jury should have been instructed that there was no evidence of negligence.

United Elec. L. & P. Co. v. State, 60 Atl. (Md.) 248.

In Lanning v. Pittsburgh Ry. Co., 79 Atl. (Penn.) 136, 32 L. R. A. (N. S.) 1043, the syllabus of a well considered case says:

"An electric railway company cannot be held liable for an injury to a person on the street by the breaking of its trolley wire, on the ground that there is no other apparent cause for the break than the negligence of the company."

In this case the court said:

> "There was no direct proof of any negligence that caused the wire to break, but the learned trial judge submitted the question of the defendant's liability to the jury, because, as he states in his opinion over-ruling the motion for a new trial, and refusing judgment for the defendant, he thought it could be fairly inferred from all the circumstances that the company had either negligently constructed its trolley wire, or had failed to keep it in proper repair at the point of the accident, and no other cause was apparent to which the falling of the line could be attributed. The question for the jury was not whether there was no other apparent cause than the defendant's negligence for the breaking of the wire. The question before them was, did the negligence of the defendant company cause it to break? If this did not appear, there was no liability upon the defendant. If a jury in an action against a street railway company is to be permitted to find it guilty of negligence because there is no other apparent cause fo rthe act complained of, it is quite safe to assume that in every case the verdict will be for the plaintiff."

In Cavanaugh v. Alleghany County Light Co., 75 Atl. (Penn.) 21, it was held that negligence on the part of the defendant was not established by evidence that a boy was found lying on the sidewalk, badly burned and dead, with his body in contact with a live wire belonging to the defendant, which had broken and fallen into the street and that it had emitted sparks for some time previous to its breaking, it not being shown that sparks

were emitted at or near the point where it broke and the cause of the breaking being entirely a matter of conjecture.

In Loomis v. Toledo Ry. & L. Co., 140 N. E. (Ohio) 639, a severe wind storm was pleaded as an act of God in defense. It was held that the doctrine of res ipsa loquitur was not applicable where the evidence raised a *probability* of the wire breaking because of an extraordinary wind.

In Johnson v. Graves Harbor R. R. & L. Co., 253 Pac. (Wash.) 819, a severe wind storm was interposed as a defense, held that such defense should be specially pleaded. This is a good case on the evidence sustaining such a defense. In affirming a judgment for the defendant, the court said:

> "An examination of the evidence discloses that the respondent met the burden by evidence almost conclusive in its character. The testimony showed that its plant and system were in proper condition; that the cause of the wire falling to the street was the unusual severity of the storm which *whipped the wires together, causing them to arc and flame, burning through the weatherproofing and melting the copper wire itself;* that the respondent's general manager and all employees that could be summoned were on duty from the time a realization came to them of the destructiveness of the storm, and they endeavored in every way to properly safeguard and protect individuals and property; that the storm was the most severe in the history of the city; and that in the region covered by the Weather

> Bureau at Seattle the records showed the highest wind velocity since the establishment of the United States Weather Bureau there in 1892. We need not detail the evidence further. It was so complete that if the verdict had been contrary it would have been against the weight of the evidence, and the trial court would have, no doubt, granted a new trial." (Italics ours.)

In Summons v. Terrill Elec. L. Co., 1 S. W. (2d) 513, it was held a verdict was properly directed for the defendant in the absence of evidence that it knew the wire was broken and hanging, that it had been hanging a sufficient time to charge defendant with knowledge of its condition, that the wires were old or improperly strung or other evidence than that the wire was broken and hanging over the sidewalk.

SPARKING WIRES.

It is stated on page 23 of appellant's brief that:

> "The wire in question had been defective and had been giving off sparks for a long time prior to the accident (R. pp. 116, 117, 120); defendant had been notified of this condition three times by Mrs. Loble (R. pp. 127, 85, 112, 113, 116, 118, 119), once by Fred Cummings at 10:26 p. m. (R. p. 99) being about forty-five minutes before the injury." (App. Br. p. 23.)

The above statement is not supported by the record. As already stated herein, there were five wires on the cross arms on the poles along Ewing Street (R. p. 76) and there is not a witness who

testified that the wire they saw sparks coming from was the same wire that broke or burned in two the night of January 11, 1928.

The witness Reynolds, called in rebuttal, testified that he was working for the defendant in October, 1926—15 months before, and that his attention was called by Mrs. Loble to *a wire* on the pole or post at the alley in front of 411 North Ewing Street (R. p. 112, 113), which was Mrs. Loble's home (R. p. 123); that this wire was sparking at a point about *2½ feet* from the insulator on the cross arm; that he fixed it at that time and made no report of it to the defendant and that, if the wire broke 12 feet from the pole, the place he fixed had nothing to do with the break on January 11th, 1928 (R. 117). Nowhere does this witness identify the wire that Mrs. Loble called to his attention and that he fixed as being the same wire that broke or burned in two on January 11th.

Mrs. Loble's testimony as to sparking wires does not show which wire or whereabouts on the wire she observed sparks (R. pp. 123-127).

The same is true of the testimony of all the other witnesses for plaintiff regarding conditions of the wires. See testimony of Marion Lane (R. p. 29); Tomcheck (R. p. 34); Mrs. Tomcheck (R. p. 37); Williams (R. pp. 39 and 41); Yund (R. pp. 43 and 44); Cummings (R. p. 46).

The witness Reynolds also testified the wire he fixed in 1926 was not insulated near the cross arm and that when it is on a wet post and uninsulated, it is more liable to break (R. pp. 113 and 117).

Bernier, on cross-examination, admitted that the insulation may in some places be worn off near the cross arms or at other spots (R. pp. 86 and 87).

But there is no evidence to show the wire broke near the cross arm or at a point where it was not insulated. On the contrary, the testimony of Bernier shows, without dispute, that the wire broke or burned in two at a point 12 feet from the pole and cross arm in the alley near Loble's home (R. p. 78), and that he cut off a piece of the wire on either side of the break which pieces were introduced in evidence as defendant's Exhibit 1 (R. p. 78). Such pieces of wire show that the wire at the point of breaking or burning was insulated up t othe time the break or burn occurred (R. pp. 99, 103, 106).

Furthermore, that night it was chinooking and wet (R. p. 34 and p. 57), and the wind was very gusty (R. pp. 68 and 107). Mr. Stussey, electrical engineer of the Montana Power Company at Butte, (R. p. 101), testified:

> "If this wire has insulation such as is called for unde rthe statute of Montana; that is, triple braid weatherproof wire, fourteen or fourteen and a half inches apart, a gusty wind will bring these wires together and the *insulation, if wet, will cause sparks*, and if for

> some cause they break and lay on the ground any person coming in contact with them will get burned." (R. p. 103.) also R. p 94

Therefore, the evidence, admitted over defendant's objection (R. p. 35) as to the condition of wires does not prove or tend to prove any negligence under the issues in this case, as such evidence, undisputed, shows the wire broke at a point at least 10 feet from where sparks were seen coming from *some wire* prior to January 11 and shows, without dispute, that the wire at the point of the break was properly insulated.

So the condition of *some wire* which caused sparks or the uninsulated spots on *some wires* were not a proximate cause of this wire breaking at the point where it did.

In U. S. Elec. Light & Power Co. v. State, 60 Atl. (Md.) 248, the court said:

> "It was error, we think, to have admitted the testimony set out in these exceptions. The effect of the testimony as introduced was to show that the insulation of certain of the defendant's wires was defective at other points and on other occasions than at the point of contact where the accident happened. There was manifestly no connection between the alleged defects and the injury here complained of. The death of the deceased was not caused by the burnings of the wires at other points or on other occasions, but was caused by contact with a telephone wire that had crossed a feed wire of the appellant company on the night of the accident. The testimony, therefore, was too remote and misleading, and pre-

sented an issue of negligence not involved in the case. There was also a want of identification of the wires. There was no proof that the flaring in the trees came from the wire which the telephone wire crossed."

In Cavanaugh v. Alleghany County Light Co., 75 Atl. (Penn.) 21, the court, in sustaining a nonsuit, said:

"All that was proved was that Charles R. Rainey was found lying upon the sidewalk, his body in contact with a live wire, and that a wire of the defendant, which had been stretched along Alder Street, was broken, one end of which was in contact with the body of said Rainey. It must be admitted, under the decisions of our appellate court, that this proof was not sufficient to charge the defendant with negligence. The plaintiff went further, however, and offered testimony to show that the said wire had emitted sparks for some time previous to the happening of the accident which caused the death of Charles H. Rainey, and the plaintiff argues that the inference could be drawn from said evidence that the said wire was not properly insulated, of which defect the defendant either knew or ought to have known. But this testimony did not show that this wire had been emitting *sparks at or near the point where it broke.* The wire had broken near the point where the body of Charles R. Rainey was found, but what caused it to break was, as we thought under this testimony, entirely a matter of conjecture. It is not enough for a plaintiff to show mere conjecture. The law imposes upon the plaintiff the duty of establishing the charge made, to-wit, negligence." (Italics ours.)

In Kentucky Utilities Co. v. Woodrum, et al., 5 S. W. (2nd) (Ky.) 283, the plaintiffs were injured by a broken electric light wire that had fallen onto the street. In holding th eelectric light company not liable, the court said:

> "There was a splice in the wire about 18 inches from one of the poles which had been there several years, but the wire did not break at the splice. The break was about one foot from the splice. A notch had been burned by the wire in the tree above mentioned to which a bracket was attached, but the defect in that respect had been corrected two years before the accident. There seems to be no evidence that the wire was weakened by reason of its having come in contact with the tree. Witnesses testified that a short while prior to the accident they had seen the tree burning where the wire came in contact with it. But, if the wire did not break at that point, there must be other evidence of faulty construction or maintenance. The evidence must be considered as it relates to the span between what was referred to in the evidence as pole A and pole B, and such other evidence as may show a faulty construction elsewhere, which, by reason of some relationship of the faulty construction elsewhere to the particular span in question, the span was also rendered faulty in construction of maintenance. There was evidence that the wires had been broken and spliced at several places; that there were trees through which the wires ran. There was no insulation on the wire, and this was shown by the evidence, but it is well established that wires carrying a high voltage cannot be successfully insulated. * * * *

> The question of negligence based on the ground of faulty construction or maintenance of the wire should not have been submitted to the jury, as there was no evidence to take the case to the jury on that point."

RES IPSA LOQUITUR.

It is true that an injury actually occasioned from broken electric light wires in a place where the injured party had a right to be is usually held to raise a presumption of negligence. 20 Corpus Juris, Section 63, page 380.

But, according to the great weight of authority, the above rule is not applicable when the complaint alleges specific acts of negligence instead of relying upon a general allegation of negligence alone.

Where specific acts of negligence are alleged, the plaintiff must prove such acts and cannot rely upon the presumption of negligence that arises under the res ipsa loquitur doctrine.

In Rosco v. Metro. Street R. Co., 101 S. W. (Mo.) 32, an action by a passenger for personal injuries, the court said:

> "What we have said above applies to cases where there is a general allegation of negligence, but the rule is different where there are specific allgations of negligence. The rule as to proof is different, and the rule as to presumption is different. General allegations of negligence are permitted because plaintiff, not being familiar with the instrumentalities used, has no knowledge of the specific negligent act or acts occasioning the injury, and for a like reason the rule of presumptive negli-

gence is indulged. But if plaintiff, by his petition, is shown to be sufficiently advised of the exact negligent acts causing, or contributing to, his injury, as to plead them specifically, as in this case, then the reason for the doctrine of presumptive negligence has vanished. If he knows the negligent act, and he admits that he does so know it by his petition, then he must prove it, and, if he recovers, it must be upon the negligent acts pleaded, and not otherwise. In other words, the burden of proof is upon plaintiff, as it would be in any other kind of a case. The rule of presumptive negligence and the rule allowing the pleading of negligence, generally, are rules which grow up out of necessity in cases of this character, and are exceptions to the general rules of pleading and proof. Where plaintiff, by his petition, admits that there is no necessity, the reason for the rule, ex necessitate, fails, and with it the rule itself."

In Lyons v. Chicago, Mil. & St. P. Ry. Co., 50 Mont. 532, the court, in discussing this question, said:

"The rule does not apply, however, in any case where from the evidence different inferences may be drawn as to the producing cause of the injury (McGowan v. Nelson, 36 Mont. 67, 92 Pac. 40; Andree v. Anaconda Copper Min. Co., 47 Mont. 554, 133 Pac. 1090); and since its effect is that of a presumption only, it cannot exist in the presence of the known facts (Gibson v. International Trust Co., 177 Mass. 100, 52 L. R. A. 928, 58 N. E. 278; Bell v. Town of Clarion, 113 Iowa, 126, 84 N. W. 962). If the plaintiff is in position to *allege the specific negligent acts which caused the injury* and can produce evidence in support of the charge sufficient to

make out a prima facie case, *the doctrine res ipsa loquitur cannot be invoked,* for to apply it under such circumstances would permit the jury to give double weight to the evidence; first to the facts themselves, and also to the inference or presumption which the law deduces from the existence of those facts, or some of them (1 Elliott on Evidence, Sec. 92)." (Italics ours.)

This is the rule in the Federal Courts.

Midland Valley Ry. Co. v. Connor, 217 Fed. (8th Cir.) 956;
White v. The Chicago & G. W. Ry. Co., 246 Fed. (8th Cir.) 427.

See also:

Pierce v. Great Falls & C. Ry. Co., 22 Mont. 445;
Ramch v. Des Moines Elec. Co., 218 N. W. (Iowa) 340;
Whitmore v. Herrick, 218 N. W. (Ia.) 334;
Walser v. Mo. Pac. R. Co., 6 S. W. (2nd) (Mo.) 632;
Schneider v. Wheeling Electrical Co., 28 S. E. (W. Vir.) 733;
Johnson v. Galveston H. & N. R. Co., 66 S. W. (Tex.) 906;
Palmer Brick Co. v. Chennall, 47 S. E. (Ga.) 329;
Southern Ry. Co. v. Adams, 100 N. E. (Ind.) 773;
Byland v. DuPont etc. Co., 144 Pac. (Kan.) 251;
Durst v. Southern Ry. Co., 125 S. E. (S. Car.) 651.

In this last case, paragraph 4 of the complaint charged a specific act of negligence and paragraph 5 alleged "that said acts on the part of the de-

fendant were due to their negligence," etc. The court held that the allegations in paragraph 5 referred to the spicific acts of negligence alleged in paragraph 4 and did not constitute a general charge of negligence, as did also Judge Bourquin in his opinion in the case at bar, in granting the directed verdict (R. pp. 133-140).

It is true that several courts have held that even though specific acts of negligence have been alleged, if there is also a general allegation of negligence in the complaint, that evidence of other acts or omissions are admissible under such general allegation, if it is a case where the res ipsa loquitur doctrine would apply if no specific allegation had been made.

See:

> Walters v. Seattle R. & S. Co., 93 Pac. (Wash.) 419, 24 L. R. A. (N. S.) 788 and Note.

The author of this note, after referring to the rule limiting plaintiff to his specific allegations and to the rule permitting evidence of other matters, says:

> "A third class of cases, and these seem to present the more reasonable rule, hold that where a plaintiff makes specific allegations of negligence, he must rely for his recovery upon such specific acts of negligence, and cannot recover for any other negligent acts; but he is not deprived of the benefit of the doctrine of res ipsa loquitur to establish the specific acts of negligence."

As heretofore shown, defendant at the trial objected to evidence of other acts than those specifically alleged (R. pp. 33 and 35).

We submit, however, that even if the rule, that when a general charge of negligence is made and also a specific charge that the latter does not preclude evidence under the general charge, that such rule cannot be applied in this case for the reason, as heretofore pointed out, that there is no general charge of negligence in this complaint. The only negligent acts alleged or complained of are the specific acts set out in paragraph 15 of the complaint and the allegations of paragraphs 19 and 20 (R. p. 8) merely refer to such acts, as did the complaint in Durst v. Southern Railway Company, supra.

Counsel for appellant repeatedly cite in their brief the case of Kaemmerling v. Athletic Mining & Smelting Co., 2 Fed. (2nd) (8th Cir.) 574. In that case it was alleged that the injuries resulted "from the negligence of said defendant, its agents, servants and employees, in a manner unknown and unexplained to this plaintiff." The difference between such charge of general negligence and the allegations of the complaint in this case is manifest.

However, in view of the conflict in the authorities as pointed out in 24 L. R. A. (N. S.) 788, and of plaintiff's contention at the trial that the complaint did contain a general charge of negligence

upon which they relied, it was considered a safer practice for the defendant not to rely solely on the defense that plaintiff had failed to prove the specific negligence charged. Such practice was especially justified in this case as defendant was able to show standard equipment in its wire, cross arms, etc., and also that the breaking of the wire was due to an act of God.

STANDARD EQUIPMENT.

The width between electric light wires on cross arms of poles must be not less than 14 inches. Section 2679 Revised Codes of Montana 1921 provides:

> "CROSS-ARMS. All cross-arms shall be made from clear, straight-grained wood, or standardized material. The cross-section of wood arms shall be not less than three and one-half by four and one-half inches. The pin spacing shall be, for six-pin arms, not less than thirty-inch center for pole pin spacing, *fourteen-inch side spacing*, and five-inch end spacing; and four-pin arms not less than thirty-inch center for pole pin spacing, *fourteen-inch side spacing* and five-inch end spacing." (Italics ours.)

The insulation on electric wire, *where insulation is used*, must be at least triple braided, weather-proof cover. Section 2686 Revised Codes of Montana of 1921 provides:

> "WIRE INSULATION. The standard insulation, wherever insulation is used, for any wire or cable run, placed, or erected in any city or town in the state of Montana, and

used to conduct or carry electricity for light, heat, or power, for all voltage, shall have at elast a triple-braided weatherproof cover."

Section 2688 of said Codes provides:

"FOREGOING PROVISIONS APPLY TO CURENT AND VOLTAGE FOR LIGHT, HEAT AND POWER. All of the foregoing provisions of this act shall include current and voltage used for light, heat, or power, not to exceed seventy-five hundred volts of electricity."

It will be noted that Section 2686 does not declare that all wire must be insulated, but merely that "wherever insulation is used" it must be of a certain kind. Insulated wire is not uniformly used for overhead wires (R. p. 93 and pp. 104 and 105). But here the evidence shows that the wire involved was insulated as required by statute for insulated wire and also standard equipment. The voltage of this wire was 2300 volts (R. p. 56); the wire was triple braided, weatherproof cover; size No. 6, hard drawn copper, the standard wire and so recognized by the Bureau of Standards of the Department of Commerce of the United States (R. pp. 78, 79, 101, 102 and 106); the space between the wires on the cross arms was 14½ inches, or ½ inch more than the minimum required by the statute (R. p. 77).

Mr. Schultz, the general manager of the defendant company, testified:

"The wire, poles and arms, sag, and insulation are the standard appliances, all the way

through, used by electric light companies generally throughout the country." (R. p. 106.)

At the point where the wire broke or burned in two it was properly insulated (R. pp. 94, 103, 106). If the defendant used standard equipment, as required by statute, and such as is in general use by electrical companies, it had discharged its duty in that matter, as has been held in many cases involving electricity.

Prussly v. Bloomington & Normal Ry. & Light Co., 111 N. E. (Ill.) 511;
City of Cuthberth v. Gunn, 94 S. E. (Ga.) 637;
Martmek v. Swift & Co., 98 N. W. (Ia.) 477;
Owen v. Appalachian Power Co., 89 S. E. (W. Vir.) 263;
Norfolk & P. Traction Co. v. Daily, 69 S. E. (Vir.) 963;
Texas Traction Co. v. George, 149 S. W. (Tex.) 438.

In Cummings v. Reins Copper Co., 40 Mont. 595, the court said:

"The business of mining is accompanied by more or less hazard in all of its branches. While this is so, the rule of law by which the conduct of the employer toward his employees is governed is that of ordinary care; that is, such care as would be exercised by an ordinarily prudent man engaged in the same business. He must observe this rule in selecting the tools and appliances which he furnishes to his employees to be used in performing their work. When he has done so, he has fully discharged his duty in this behalf. He is not bound to furnish the best appliances, nor the

> safest, nor to provide the best method for their operation, in order to save himself from responsibility for accidents resulting from their use. If, at the time an appliance is selected, it is in general use and reasonably adapted to the purpose for which it is employed, the continuance of its use does not in itself indicate negligence, even though there may be safer devices used by others to accomplish the same purpose."

See also:

20 Ruling Case Law, Section 20, Page27.

In rebuttal, plaintiff called one Reynolds (R. p. 111), who testified that in order to shut off the current on this wire it was necessary to shut off all the lines on the east side of town; that there was a primary cut off at Sixth and Rodney Street and also one at the plant (R. p. 114). He also testified:

> "I know of a type of fuse known as expulsion fuse. With that type of fuse, when the wire becomes short circuited and goes to the ground carrying a heavy load it will explode the fuse and one wire will be killed, or the circuit, whichever is in trouble; so that, if that type fuse had been used in this case, when the wire hit the ground it would have been dead on hitting the ground." (R. pp. 114 and 115.)

There is no evidence to show that such device is in general use by electrical companies. His testimony is merely to the effect that *he knew* of some device for shutting off a current other than the method used in Helena. That such a device was

better or more dependable than those used by the defendant was not shown.

Defendant's evidence showed that instead of a fuse it used an automatic circuit breaker. Bernier testified:

> "There is no fuse on the circuit; there is what we call a circuit breaker to take the place of fuses and does shut if this is interrupted three times; that is what we call a circuit breaker. No, that circuit breaker does not advise us of a break in the wire; it advises everybody there of a break in the main some place. This would show us the primary wire, a wire of 2300 voltage, was having difficulty, that there was trouble some place there. We have a record to show what it means.
>
> Q. I assume someone else keeps that record at the shop?
>
> A. Yes, it is automatic." (R. pp. 87 and 88.)

Schultz, when cross examined as to the use of fuses, testified:

> "There is no equipment made which will cause a circuit to open invariably; it may or may not depend on what the ground condition is near the place, whether it makes a good ground or not. * * * *
>
> If it was the main line, why, you could not break it; you could on a circuit branch; on the main line you could not; you could not." (Rec. pp. 108 and 109.)

As stated in several of the last cases cited above, a person or company is not bound to furnish the best appliances nor the safest. So long as they

are such as are in general use and reasonably adapted to the purpose for which employed, their use does not indicate negligence, even though there may be safer devices used by some to accomplish the same purpose. On this point see also:

Snyder v. Wheeling Electrical Co., 28 S. E. (W. Vir.) 733—a case squarely in point on evidence very similar to that in this case;

Martineck v. Swift & Co., 98 N. W. (Ia.) 477 — where a witness gave testimony similar to that of Reynolds in this case;

Boston C. C. & N. Y. Canal Co. v. Seaboard Transp. Co., 270 Fed. (1st Cir.) 525—affirmed in 256 U. S. 692.

In Lake v. Shenango Furnace Co., 160 Fed. (8th Cir.) 887, Judge Sanborn said:

> "There are cases in which the act or omission at issue is in itself so clearly negligent that the fact that other persons in the same or like circumstances have been guilty of it is insufficient to modify its character or effect. Dawson v. Chicago, R. I. & P. Ry. Co., 52 C. C. A. 286, 288, 114 Fed. 870, 872; Gilbert v. Burlington, C. R. & N. Ry. Co., 63 C. C. A. 27, 32, 128 Fed. 529, 534. The defendant's act or omission was not of that character; and in such a case the true test of actionable negligence is the degree of care which persons of ordinary intelligence and prudence commonly exercise under the same circumstances. If in a given case the care eexrcised rises to or above that standard, there is no actionable negligence; if it falls below it there is."

Assuming, for the moment, that plaintiff's complaint does contain a general charge of negligence, and that he is not limited to the specific charges of negligence therein, we submit that the evidence of the defendant, showing its wire and other equipment complied with the statutes and with the U. S. Bureau of Standards; that they were the same as those generally used by persons engaged in similar business throughout the country; that there was no apparent defect in the wire at the point of breaking and that there was not a reasonable time after the breaking in which to discover and repair the same, completely overcomes any presumption of negligence under the res ipsa loquitur doctrine and made the question of defendant's negligence one of law for the court.

In Dierks Lbr. Co. v. Brown, 19 Fed. (2nd) (8th Cir.) 732, the court said:

> "Assuming as we do that the doctrine of res ipsa loquitur applies in this case, hence that a prima facie case of negligence was established, defendant could exculpate itself by showing there was no defect in its appliances, or that if there was it was caused by circumstances beyond its control, or had existed for so short a period of time that it could not reasonably be expected to have been advised of it. * * * *
>
> As the evidence stood at the close of the case, it showed conclusively that, if there was any defect sufficient to cause an excessive current of electricity to pass over the wires, that defect occurred within les sthan an hour from the time of the accident. The testimony

also, in our judgment, fairly shows that there was no defect in the wires, in the grounded system, in the transformer, or otherwise on the day of the alleged accident. It would seem that the explanation of defendant is sufficient to show that the alleged injury did not occur from want of due care on its part, and the inferences of negligence raised by the application of the doctrine of res ipsa loquitur are refuted. * * * *

Whether there is sufficient evidence to warrant the submission of a case to the jury is a question for the court. We conclude the evidence was not sufficient. The motion to instruct a verdict for defendant, made at the close of all the evidence, should have been sustained."

In Lawson v. Mobile Elec. Co., 85 So. (Ala.) 257, the syllabus of a well considered opinion says:

"In absence of evidence of actual negligence, evidence of due care by the defendant will make the case one for the court, in the sense that the mere presumption involved in the res ipsa loquitur doctrine will not be given the effect of evidence, so as to raise a conflict for jury decision."

In Scarpelli v. Wash. Water Power Co., 114 Pac. (Wash.) 870, where a party was killed by a fallen light wire in the street, the court said:

"When a plaintiff in actions of this character makes no attempt to show the negligent cause of the act complained of, but relies wholly on the legal presumption of negligence his facts establish, he must accept or controvert the defendant's explanation as to the cause of the act, and show its insufficiency or other nonapplicable features, if he would

prevent the court from holding as a matter of law that the presumption is overcome."

See also:

Smith v. N. P. Ry. Co., 53 N. W. (N. Dak.) 173;
Scott v. So. Sierras Power Co., 190 Pac. (Cal.) 478;
Goss v. N. P. Ry. Co., 87 Pac. (Ore.) 149;
Scillars v. Universal Service, 228 Pac. (Cal.) 879;
Spaulding v. Chi. & N. W. Ry. Co., 33 Wis. 582;
Paine v. Cumberland Tel. & T. Co., 249 Fed. (5th Cir.) 477.

In San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 56 L. Ed. 680, the court said:

> "These circumstances pointed so persuasively to negligence on its part that it was not too much to call upon it for an explanation. Of course, if the cause of the injury was one which it could not have foreseen and guarded against, it was not culpable; but in the absence of that or some other explanation there was enough to justify the jury in finding it culpable."

Here the defendant has shown that the injury could not have been foreseen and guarded against and also shown proper equipment and an extraordinary wind storm—explanations sufficient to overcome any presumption of negligence and to warrant a directed verdict.

AN ACT OF GOD.

The defendant pleaded, as a defense, an unusual, excessive and extraordinary wind storm during the

evening and night of this accident (R. p. 12). The evidence clearly sustains this defense.

According to the weather bureau records, the wind between 10:38 P. M. and 11:38 P. M. reached a velocity of 77 miles per hour (R. p. 57), and according to such records this wind did more damage than any previous wind (R. p. 60). It blew down many electric light and telephone poles, wires, signs, street lamps, smoke stacks, chimneys, buildings, sky lights, etc., all over the city (R. pp. 57, 67, 69, 71, 72, 74, 82, and 83). The entire force of linemen were out looking after wire trouble practically all night (R. p. 82).

As to the sufficiency of evidence to sustain such a defense:

See:

Johnson v. Graves Harbor R. R. & L. Co., 253 Pac. (Wash.) 819, already quoted from in this brief;

Lamb v. Licey, 102 Pac. (Idaho) 378.

In Loomis v. Toledo Ry. & Light Co., 140 N. E. (Ohio) 639, it was held that a presumption of negligence arises from proof of the poles and the electric wires falling upon plaintiff, which requires an explanation of the cause thereof from the defendant, but that where the evidence raises a *probability* that their falling was caused by a severe wind storm, the presumption of negligence does not arise and plaintiff must sustain his specific

allegations of negligence by a preponderance of the evidence.

In Lucid v. E. I. DuPont Etc. Power Co., 199 Fed. (9th Cir.) 377, Judge Gilbert said:

> "The doctrine of res ipsa loquitur involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, *but excludes all others.*" (Italics ours.)

45 Corpus Juris, Section 780, page 1212, says:

> "Accordingly, where there are two or more persons or causes which might have produced the injury, some, but not all, of which were under the control of defendant or for which he was legally responsible, plaintiff, in order to invoke the doctrine, must exclude the operation of those causes for which defendant is under no legal obligation. It has been held that the doctrine is to be applied only when the nature of the accident itself not only supports the inference of defendant's negligence, but excludes the idea that the accident was due to a cause with which defendant was unconnected."

In People v. Utica Cement Co., 25 Ill. App., it was held that,

> "A storm, flood, or freshet, in order to constitute an act of Providence, need not be *unprecedented* if it is unusual, extraordinary and unexpected."

The fact that a similar flood, otherwise unprecedented, had occurred once in each of the two pre-

ceding years held not to prevent a defense of act of God in an action for damages due to a similar unprecedented flood in the third year.

Norris v. Savannah etc. Ry. Co., 23 Fla. 182, 11 Am. S. Reports 355.

In this case the court said:

> "An extraordinary flood, such as that of 1884, described in the testimony, is the act of God, and injury caused to the appellant by it solely is not a ground of action against the common carrier. * * * * We do not think the rises of the Ohio in 1882 and 1883 deprive the rise of 1884 of its character as an act of God, or required the appellee to have reconstructed its road, or provided other means of transportation across the river to meet such emergency. The testimony shows that up to the time the witnesses in the case testified, these rises were wholly unprecedented."

Thompson on Ngligence, in Section 1241, says:

> "Judicial opinion thus, to some extent, places the company betwixt the devil and the deep sea; but their lot is somewhat mitigated by the recollection that they are not liable for damages sustained by failing to erect their poles with such strength as to withstand those great storms which, though liable to happen in any American climate, are placed by the judges in the category of 'acts of God'; which is another way of saying that they are only bound to reasonable care in the construction and maintenance of their lines."

See also:

Ward v. Atl. & Pac. T. Co., 71 N. Y. 81.

If it should be held, as argued by plaintiff, that the complaint does contain a general charge of

negligence under whic hthe doctrine of res ipsa loquitur might be invoked, the evidence in support of defendant's defense of an act of God shows that the breaking of the wire was probably due to this extraordinary wind storm and destroys any presumption of negligence that otherwise might have existed under such doctrine. So there was no question for the jury even on the theory that the complaint contains a general charge of negligence.

We submit that the plaintiff failed to prove the specific acts of negligence alleged by any substantial evidence, and that under the pleadings he was limited to such issue; also, that he failed to make a case for the jury upon any other theory and that the judgment should be affirmed.

Respectfully submitted,
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